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No. ——

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IN THE

Supreme Court of the United States

JOAN SWAIN AND IAN A. O'CONNOR, and on behalf of numerous ascertainable individuals,

Petitioners,

v.

ALLSTATE INSURANCE COMPANY, INC.; THE ADMINISTRATIVE COMMITTEE OF THE ALLSTATE AGENTS PENSION PLAN; THE PENSION COMMITTEE OF THE ALLSTATE AGENTS PENSION PLAN; THE ALLSTATE AGENTS PENSION PLAN (AS NOMINAL DEFENDANT); WAYNE E. HEIDEN; NORBERT A. FLOREK; LOUIS G. LOWER, II; THOMAS W. TEWKSBURY; DONALD VIKEN; AND JOHN DISERIO,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether ERISA plan participants state a claim for breach of fiduciary duty under ERISA seeking not money damages but rather the equitable remedy of disgorgement and alleging that the plan fiduciaries intentionally and in writing misrepresented the reasons for plan amendments but the misrepresentations are such that no action can be taken in reliance?

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Petitioners Joan Swain and Ian O'Connor, on behalf of themselves and numerous other ascertainable and similarly situated persons, hereby petition for a writ of certiorari to review the judgment of the Eleventh Circuit in this case. The Eleventh Circuit held that detrimental reliance was an essential element of an ERISA breach of fiduciary claim brought by plan participants seeking not money damages but rather the equitable remedy of disgorgement and alleging that the plan fiduciary intentionally and in writing misrepresented the reasons for plan amendments. The net effect of the Eleventh Circuit's opinion is to allow ERISA fiduciaries to make intentional misrepresentations at will, as long as these

misrepresentations are such that no action can be taken in reliance. This case is not about plan participants making a decision in reliance on a misrepresentation that directly injured them, but seeks instead to disgorge from the plan fiduciaries the monies associated with the intentional misrepresentations. The decision by the Eleventh Circuit sets a precedent that allows plan fiduciaries to lie with impunity as long as the lies cannot induce detrimental reliance. This is a result this Court should not allow to stand as it is in direct conflict with both the text and purpose of the ERISA statute and the common law of trusts.

OPINIONS BELOW

The per curiam opinion of the court of appeals is unreported and is attached hereto as Appendix A. The order of the district court adopting the report and recommendation of the magistrate judge in full and dismissing the case is unreported and is attached hereto as Appendix B. The report and recommendation of the magistrate judge is unreported and is attached hereto as Appendix C.

JURISDICTION

The opinion of Eleventh Circuit Court of Appeals affirming the district court's order dismissing the case was entered on February 26, 2001. No petition for rehearing was filed. The appellate jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act provides in pertinent part:

29 U.S.C. § 1001

> (b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries. It is hereby declared to

be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts. (c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance. It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

* * * *

29 U.S.C. § 1002

For purposes of this title:

(21) (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such

plan. Such term includes any person designated under section 405(c)(1)(B) [29 U.S.C. § 1105(c)(1)(B)].

* * * *

29 U.S.C. § 1102

(a) Named fiduciaries.

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this title, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

* * * *

29 U.S.C. § 1104

(a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d), 4042, and 4044 [29 U.S.C. §§ 1103(c), (d), 1342, 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

* * * *

29 U.S.C. § 1109

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

* * * *

29 U.S.C. § 1132

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. § 1109];

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this title or the terms of the plan.

STATEMENT

In a per curiam opinion, the Eleventh Circuit held that detrimental reliance was an essential element of an ERISA breach of fiduciary claim brought by plan participants seeking not money damages but rather the equitable remedy of disgorgement and alleging that the plan fiduciary intentionally and in writing misrepresented the reasons for plan amendments. The circuit court thus affirmed the district court's alternative holding[1] that because plaintiffs failed to allege detrimental reliance, their claim must fail as a matter of law. The net effect of the Eleventh Circuit's opinion is to allow ERISA fiduciaries to make intentional misrepresentations at will, as long as these misrepresentations

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[1] The District Court for the Southern District of Florida, Moreno, J., also held that the defendants were not acting in a fiduciary capacity when they made the communications that plaintiffs contend were knowing and intentional misrepresentations. The Eleventh Circuit did not reach this issue.

are such that no action can be taken in reliance. This case is not about plan participants making a decision in reliance on a misrepresentation that directly injured them, but seeks instead to disgorge from the plan fiduciaries the monies associated with the intentional misrepresentations. The decision by the Eleventh Circuit sets a precedent that allows plan fiduciaries to lie with impunity as long as the lies cannot induce detrimental reliance. This is a result this Court should not allow to stand as it is in direct conflict with both the text and purpose of the ERISA statute and the common law of trusts.

A. Procedural History

Plaintiffs filed a complaint on April 15, 1996. (Dt. Ct. Docket # 1). In lieu of an answer, on June 11, 1996, Defendants filed a motion to stay the case pending resolution of the then-pending appeal in *Scott v. Administrative Committee of the Allstate Agents Pension Plan*, 113 F.3d 1193 (11th Cir. 1997). (Dt. Ct. Docket # 13). The District stayed the case (Dt. Ct. Docket # 50) until September 9, 1997.

The Defendants filed a Motion to Dismiss or in the alternative, for Summary Judgment on claim and issue preclusion grounds on October 24, 1997. (Dt. Ct. Docket # 61). The District Court considered the motion as one for summary judgment, and granted the motion in part and denied the motion in part on January 25, 1999. (Dt. Ct. Docket # 74). The Defendants answered the complaint on February 10, 1999. (Dt. Ct. Docket # 81).

Plaintiffs moved for (Dt. Ct. Docket # 82) and were granted (Dt. Ct. Docket # 89) leave to amend the complaint. The first amended complaint was filed on April 19, 1999. (Dt. Ct. Docket # 90). Plaintiffs filed a second amended complaint on May 14, 1999. (Dt. Ct. Docket # 102). Defendants answered the first and/or second amended complaint on May 28, 1999. (Dt. Ct. Docket # 113). Both the first and second amended complaints were stricken on

June 8, 1999. (Dt. Ct. Docket # 115, 116). A final amended complaint was filed on June 22, 1999. (Dt. Ct. Docket # 117). Plaintiffs moved for summary judgment on July 23, 1999. (Dt. Ct. Docket # 123).

In lieu of an answer to the complaint, Defendants filed a motion to dismiss on July 27, 1999. (Dt. Ct. Docket # 127). After extensive briefing, on January 24, 2000, Magistrate Judge Dubé issued a Report and Recommendation recommending the Defendants' motion to dismiss be granted and the Plaintiffs' motion for summary judgment be denied. (Dt. Ct. Docket # 252). District Court Judge Moreno adopted the Report and Recommendation in full on February 29, 2000, finding first that the defendants were not acting in a fiduciary capacity, and therefore breached no fiduciary duty, when they communicated to plan participants the reasons for plan amendments, and second, that plaintiffs' failure to allege detrimental reliance or loss causation was fatal to their ERISA claim. (Dt. Ct. Docket # 257).

Plaintiffs timely filed their Notice of Appeal on March 29, 2000. (Dt. Ct. Docket # 261). The Eleventh Circuit Court of Appeals issued a per curiam opinion on February 26, 2001 affirming the district court's dismissal of the case, holding that because plaintiffs "did not, and could not, allege that they relied on the statements to their detriment, they cannot prevail as a matter of law."

B. Statement of the Facts

In 1986, Congress passed the Tax Reform Act of 1986 ("the Act" or "TRA-86") which required, inter alia, plan sponsors to amend benefit formulas to eliminate discrimination in favor of highly compensated individuals. *See Scott*, 113 F.3d at 1195; 26 U.S.C. § 401(b). One type of such discrimination was the Social Security offset which entailed the reduction of a participant's plan benefits (which are commonly calculated as a percentage of the individual's

annual salary) by the amount of his/her Social Security benefit. *Id.*

TRA-86 required that plans have non-discriminatory benefit formulas in place by January 1, 1989. *See id.*; 26 U.S.C. § 401(b). To assist plan sponsors in complying with the Act, 26 U.S.C. § 401(l)(5)(F) required the Secretary of the Treasury to issue regulations to guide plan sponsors in amending their plans in order to meet the January 1, 1989 deadline. *See id.* By late 1988, however, the IRS had failed to issue any regulations. *See id.*

To lessen the predicament of plan sponsors awaiting the issuance of its final regulations, on December 27, 1988, the IRS issued Notice 88-131, 1988-2 C.B. 546, which provided several alternatives pursuant to which plan sponsors could retain the right to amend their plans retroactively to comply with TRA-86. *See Scott*, 113 F.3d at 1196. The Allstate Insurance Company's Agents Pension Plan included a discriminatory Social Security offset and had to be amended under TRA-86 to protect its tax-qualified status. *See id.*

On March 13, 1989, the Pension Committee of the Allstate Agents' Pension Plan adopted IRS Model Amendment 3, suspending benefit accruals for the Plan participants after December 31, 1988 until the Plan could later be amended to comply with TRA-86. *See id.* From February 1989 through December 1994, Defendants distributed at least six notices through the U.S. mail to thousands of Plan participants informing them of the impact of TRA-86 on the Plan and the details of three amendments.[2] One amendment eliminated the

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[2] February 1989 letter from Donald Viken to all Allstate employees (Dt. Ct. Docket # 124-Exhibit "B"); December 1989 letter from Thomas Tewksbury to Allstate Associates (Dt. Ct. Docket # 124-Exhibit "C"); April 1990 letter from Thomas Tewksbury to Allstate Associates (Dt. Ct. Docket # 124-Exhibit "D"); September 1990 letter from Thomas Tewksbury to Allstate Associates (Dt. Ct. Docket # 124-Exhibit "E"); October 26, 1990 resolution passed by the Pension Committee (Dt. Ct.

Social Security offset as required by TRA-86. A second amendment raised the normal retirement age from 63 to 65. The third amendment reduced Allstate's contribution rate from 2.5% to 2.0%.

As noted by the district court in its January 25, 1999 order denying in part defendants' summary judgment motion,[3] the last two notices, particularly the December 15, 1994 notice which was signed by the Plan Administrator, authored by an attorney self-described as an ERISA expert who believed he was writing an ERISA-mandated disclosure, titled as being issued pursuant to an ERISA mandatory disclosure provision, and distributed on Plan letterhead to Plan participants, clearly describe all three amendments as mandated by TRA-86 and, therefore, required to be applied retroactively to the Plan. Defendants have conceded that two of the adopted amendments were not required in order for the Plan to comply with TRA-86. (Dt. Ct. Docket # 74 at 9) ("the Defendants concede that decreasing the benefit rate from 2.5% to 2% of salary and increasing the retirement age from 63 to 65 were not changes required by the Tax Reform Act of 1986"). Indeed, Defendants have conceded that, at the time the amendments were drafted and approved and the notices were mailed, they knew these amendments were not required

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Docket # 124-Exhibit "F"); and the December 15, 1994 notice from John Diserio to all participants in the Agents Pension Plan (Dt. Ct. Docket # 124-Exhibit "G").

[3] The district court stated:

> "In this last notice, it is clear that all three amendments are described as if required by law. Accordingly, there appear to be triable issues of fact as to the understanding of the average Plan participant and whether the Defendants misrepresented the Plan amendments."

January 25, 1999 Order at 13 (Dt. Ct. Docket # 74) (attached hereto as Exhibit E).

in order to maintain the Plan's "qualified" status and comply with TRA-86.[4]

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit Court of Appeals erred when it found that detrimental reliance was a necessary element of Plaintiff's ERISA breach of fiduciary claim. ERISA imposes strict duties of loyalty on plan fiduciaries, and lying is completely inconsistent with these duties. The net effect of the Eleventh Circuit's opinion is to allow ERISA fiduciaries to make intentional misrepresentations at will, as long as these misrepresentations are not such that plan participants can or do act to their detriment in reliance on them. This is a result this Court should not allow to stand as it is in direct conflict with both the text and purpose of the ERISA statute.

"ERISA imposes high standards of fiduciary duty upon those responsible for administering an ERISA plan." *Herman v. NationsBank Trust Co.*, 126 F.3d 1354, 1361 (11th Cir.1997) (quotation omitted). ERISA mandates, among other requirements, that:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan; . . .

---

[4] Donald Viken deposition in *Scott v. Administrative Committee of the Allstate Agents Pension Plan*, March 18, 1994, p. 80. (Dt. Ct. Docket # 124-Exhibit "H").

> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use . . .

29 U.S.C. § 1104(a). In *Pegram v. Herdrich*, 530 U.S. 211, 223-24, 120 S. Ct. 2143, 2151, 147 L. Ed. 2d 164 (2000), this Court expounded on the duties owed by a fiduciary: "In general terms, fiduciary responsibility under ERISA is simply stated. The statute provides that fiduciaries shall discharge their duties with respect to a plan "solely in the interest of the participants and beneficiaries," § 1104(a)(1), that is, 'for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan,' § 1104(a)(1)(A)."

Further, this Court acknowledged that the "responsibilities imposed by ERISA have the familiar ring of their source in the common law of trusts." *Pegram*, 530 U.S. at 224, 120 S. Ct. at 2151-52 (citing *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570, 105 S. Ct. 2833, 86 L. Ed. 2d 447 (1985) ("Rather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility")). "Thus, the common law (understood as including what were once the distinct rules of equity) charges fiduciaries with a duty of loyalty to guarantee beneficiaries' interests: 'The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty . . . . It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries.' 2A A. Scott & W. Fratcher, *Trusts* § 170, 311 (4th ed. 1987); *see also* G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 543 (rev. 2d ed. 1980) ('Perhaps the most fundamental duty of a trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the

interests of third persons'); *Central States*, 472 U.S. at 570-571, 105 S. Ct. at 2840; *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928) (Cardozo, J.) ('Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior')." *Pegram*, 530 U.S. at 224-25, 120 S. Ct. at 2151-52.

Applied to facts similar to those at bar, courts have held that intentional misrepresentations are anathema to the ERISA scheme. "To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense is not to act solely in the interest of the participants and beneficiaries." *Varity Corp. v. Howe*, 516 U.S. 489, 506, 116 S. Ct. 1065, 1074, 134 L. Ed. 2d 130 (1996) (citation omitted). *See also Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983) ("Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in [29 U.S.C. § 1104]."); *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154, 1163 (6th Cir. 1999) ("misleading communications to plan participants regarding plan administration . . . will support a claim for breach of fiduciary duty") (citations omitted).

In an analogous context, if an attorney breaches the fiduciary obligation owed to a client, and the remedy sought by the client is disgorgement of the fees otherwise owed to the attorney, the client need only prove the breach of the fiduciary duty and the amount associated with the breach to be disgorged from the offending party. *See Hendry v. Pelland*,73 F.3d 397, 401-02 (D.C. Cir. 1996); *Frank v. Bloom*, 634 F.2d 1245, 1257-58 (10th Cir. 1980) (stating that forfeiture is appropriate, absent showing of injury, where attorney represents clients with direct conflict of interest).

The circuit court in *Hendry* explained that compensatory damages make plaintiffs whole for the harms that they have suffered as a result of defendants' actions, and consequently, plaintiffs must prove that the defendants' breach caused them injury. Disgorgement or forfeiture of legal fees, however, serves different purposes. 73 F.3d at 401-02. First, it "deters attorney misconduct, a goal worth furthering regardless of whether a particular client has been harmed." *Id.* (citations omitted). Second, it "also fulfills a longstanding and fundamental principle of equity—that fiduciaries should not profit from their disloyalty." *Id.* This equitable remedy of disgorgement differs from the traditional concept of compensatory damages, however, because the remedy "reflects not the harms clients suffer from the tainted representation, but the decreased value of the representation itself. Because a breach of the duty of loyalty diminishes the value of the attorney's representation as a matter of law, some degree of forfeiture is thus appropriate without further proof of injury." *Id.*

This characterization of disgorgement is also reflected in the Restatement (Second) of Agency which states that an agent is not entitled to compensation for disloyal conduct, even if no harm occurs to the principal. § 469 cmt. a. Further, section 205 of the Restatement (Second) of Trusts provides that if a "trustee commits a breach of trust, he is chargeable with (a) any loss or depreciation in value of the trust estate resulting from the breach of trust; or (b) any profit made by him through the breach of trust; or (c) any profit which would have accrued to the trust estate if there had been no breach of trust." Restatement (Second) of Trusts § 205 (1959); *see also id.* § 206 (providing same remedies for breach of duty of loyalty).

The Fifth Circuit recently restated the same principle of causation and injury: "the plaintiff in a breach of fiduciary duty case need show only the agent's gain, not the plaintiff's

actual loss." *C&B Sales & Serv. Inc. v. McDonald*, 177 F.3d 384, 386 (5th Cir.1999) (citation omitted). The Fifth Circuit went on to explain that the plaintiff bears the burden of proving the defendants' gains from the breach of duty, but does not have to show any loss by the plaintiff. *Id.* at 386-87. *See also Burrow v. Arce*, 997 S.W.2d 229, 238 (Tx. 1999) ("It is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation . . . . Removing the disincentive of forfeiture except when harm results would prompt an agent to attempt to calculate whether particular conduct, though disloyal to the principal, might nevertheless be harmless to the principal and profitable to the agent. The main purpose of forfeiture of compensation when an agent breaches his duty of loyalty is not to compensate an injured principal, even though it may have that effect; rather, the central purpose of the equitable remedy of forfeiture is to protect relationships of trust by discouraging agents' disloyalty.").

ERISA of course requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104. "To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense is not to act "'solely in the interest of the participants and beneficiaries.'" *Varity Corp.*, 516 U.S. at 506, 116 S. Ct. at 1074. As this Court has explained, the principal object of ERISA is to protect plan participants and beneficiaries. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983). Section 1001(b) states that the policy of ERISA is "to protect . . . the interests of participants in employee benefit plans and their beneficiaries." Section 1001(c) explains that ERISA contains certain safeguards and protections which help guarantee the "equitable character and the soundness of [private pension] plans" in order to protect "the interests of participants in

private pension plans and their beneficiaries." The general policy is implemented by ERISA's specific provisions. Apart from a few enumerated exceptions, a plan fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." § 1104(a)(1).

Even though the misrepresentations in this case are not of a kind that can induce detrimental reliance, the failure of the Eleventh Circuit to allow the Allstate agents to prosecute an ERISA breach of fiduciary claim contravenes the promise Congress made to plan participants that they could trust their plan fiduciaries to act solely in the best interests of plan participants or the plan fiduciaries would be held responsible.

In addition, the United States District Court for the Southern District of Florida erred when it found as an alternative holding that Defendants were not acting in a fiduciary capacity when they knowingly misrepresented to Plan participants that TRA-86 required the Plan to raise the retirement age from 63 to 65 and to decrease Allstate's contribution rate from 2.5% to 2.0%. The December 1994 communication to Plan participants was signed by the Plan Administrator, authored by an ERISA attorney who believed he was writing an ERISA-mandated disclosure, titled as being issued pursuant to an ERISA mandatory disclosure provision, and distributed on Plan letterhead to Plan participants. This communication to Plan participants was made four years after the Plan amendments were made and cannot therefore be attributed to the non-fiduciary employer as part of the amending process. Instead, this communication was made pursuant to the discretionary authority, control and responsibility in the management and administration of the Plan assigned to the Plan Administrator in the Plan documents. As such, fiduciary status attaches under ERISA.

Moreover, as this Court explained in *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993), ERISA "provides that not only the persons

named as fiduciaries by a benefit plan, *see* 29 U.S.C. §§ 1102(a), but also anyone else who exercises discretionary control or authority over the plan's management, administration, or assets, *see* § 1002(21)(A), is an ERISA 'fiduciary.'"[5] *Id.* at 251, 113 S. Ct. at 2066 (emphasis added). *See also Michigan Affiliated Healthcare Sys. v. CC Sys. Corp.*, 139 F.3d 546, 549(6th Cir. 1997) (same); *Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1014 n.16 (3d Cir. 1997) (noting that there are "three ways to acquire fiduciary status under ERISA: (1) being named as the fiduciary in the instrument establishing the employee benefit plan, 29 U.S.C. §§ 1102(a)(2); (2) being named as a fiduciary pursuant to a procedure specified in the plan instrument, . . . 29 U.S.C. §§ 1102(a)(2); 29 U.S.C. §§ 1002(38); and (3) being a fiduciary under the provisions of 29 U.S.C. §§ 1002(21)(A)") (citations omitted); *Molasky v. Principal Mut. Life Ins. Co.*, 149 F.3d 881, 884 (8th Cir. 1998) (ERISA § 1002(21)(A) only comes into play when the written plan instrument fails to identify one or more named fiduciaries) (citations omitted); *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 19 (1st Cir. 1998) (§ 1102 reserves fiduciary liability for named fiduciaries and § 1002 extends that liability to functional fiduciaries).

Section 4.1(A) of the Allstate Agents' Pension Plan identifies the "Administrative Committee" as the "Named Fiduciary under the provisions of [ERISA]." (District Court Docket # 124-Exhibit A.) Section 4.3(A) identifies the Secretary of the Administrative Committee as the "Plan Administrator under the provisions of [ERISA]." (District Court Docket # 124-Exhibit A.) The December 1994 notice

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[5] To read the ERISA fiduciary provisions differently would be to render § 1102(a) a nullity. *See, e.g., Farmer v. Higgins*, 907 F.2d 1041, 1044 (11th Cir. 1990) ("We may not assume Congress to have done a useless, ineffective, or absurd thing [when it enacted legislation]") (citation omitted).

containing the misrepresentations was signed by Defendant John Diserio as the Secretary to the Administrative Committee. (District Court Docket # 124-Exhibit G.)

Although the Eleventh Circuit did not reach this issue, it is clear that the district court erred when it found that the defendants were not acting in a fiduciary capacity when they made these intentional written misrepresentations.

CONCLUSION

Defendants breached their fiduciary duty owed to Plan participants by knowingly misrepresenting that all three plan amendments were required by TRA-86. Consistent with Fed.R.Civ.P. 12(b)(6), Plaintiffs have alleged sufficient facts to state a claim for relief under ERISA to remedy this intentional breach of fiduciary duty by the Defendants. Accordingly, the District Court erred when it found otherwise and the holding of the Eleventh Circuit should be vacated and this case remanded for further proceedings.

Respectfully submitted,

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May 25, 2001

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 00-11687

D.C. Docket No. 96-00998-CV-FAM

JOAN SWAIN, IAN A. O'CONNOR,
on behalf of numerous ascertainable individuals,
Plaintiffs-Appellants,

versus

ALLSTATE INSURANCE COMPANY, INC.,
ADMINISTRATIVE COMMITTEE OF THE
ALLSTATE AGENTS PENSION PLAN, *et al.*
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

February 26, 2001

Before BLACK, RONEY and COX, Circuit Judges.

PER CURIAM:

Joan Swain and Ian A. O'Connor appeal the district court's dismissal of their civil action asserting claims that Allstate Insurance Company and various related defendants[1] breached a fiduciary duty under the Employment Retirement Income Security Act (ERISA) and violated the Racketeer Influenced and Corrupt Organizations Act (RICO).[2] We affirm.

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[1] For clarity, we collectively refer to the defendants as "Allstate."

[2] The Appellants do not challenge the portion of the district court's order dismissing their RICO claims.

The Appellants alleged that Allstate breached its fiduciary duty under ERISA by sending out various notices to participants that erroneously claimed all three amendments made to Allstate's pension plan were required by the Tax Reform Act of 1986. The gravamen of the complaint was that Allstate breached its fiduciary duty by giving plan participants an incorrect reason for the amendments. Allstate moved to dismiss pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedures. The district court, adopting the report and recommendation of the magistrate judge, dismissed the action with prejudice. The court found that Allstate was not acting as a fiduciary when it made the allegedly false statements; the Appellants had failed to allege that they relied on the statement to their detriment; and the Appellants had failed to allege that their losses, if any, were incurred by the alleged breach of fiduciary duty

The Appellants raise two issues on appeal. First, they contend that the district court erred in finding that Allstate did not act in a fiduciary capacity when it issued the incorrect notices. Second, the Appellants argue that Allstate breached its ERISA-imposed fiduciary duty by including the incorrect information in the notices. We review a district court's order granting a motion to dismiss de novo, applying the same standard used by the district court. *See Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998). We will reverse the district court unless it appears beyond doubt that the Appellants can prove no set of facts in support of their claim which would entitle them to relief. *See Harris v. Proctor & Gamble Cellulose Co.*, 73 F.3d 321, 324 (11th Cir. 1996).

After a careful review of the record and consideration of the parties' briefs and arguments, we conclude that the district court did not err in dismissing the action with prejudice. The Appellants failed to allege that they relied on the statements to their detriment. In fact, the Appellants have conceded that the statements at issue here "are not the type of fraudulent

statements that can induce an act in reliance." (R.7-240 at 9). Failure to allege detrimental reliance is fatal to a claim in breach of fiduciary duty. *See Barnes v. Lacy*, 927 F.2d 539, 542 (11th Cir. 1991). Because Appellants did not, and could not, allege that they relied on the statements to their detriment, they cannot prevail as a matter of law. Therefore, we need not reach the questions of whether Allstate was acting in a fiduciary capacity or whether it breached any fiduciary duties it owed to plan participants.

AFFIRMED.

APPENDIX B

[Filed 2/29/00]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 96-0998-CIV-MORENO

JOAN SWAIN and IAN A. O'CONNOR, and
on behalf of numerous ascertainable individuals,
Plaintiffs,

vs.

ALLSTATE INSURANCE COMPANY, *et al.*,
Defendants.

THE MATTER was referred to the Honorable Robert L. Dubé, United States Magistrate Judge, for a Report and Recommendation on Defendant's Motion to Dismiss the Amended Complaint (d.e. #127) filed on *July 27, 1999*. The Magistrate Judge filed a Report and Recommendation on *January 24, 2000*, and recommended that the motion to dismiss be GRANTED and the motion to certify the class be DENIED as MOOT. The Court has reviewed the entire file and record. The Court has made a *de novo* review of the issues that the objections to the magistrate Judge's Report and Recommendation present, and being otherwise fully advised in the premises, it is

ADJUDGED that United State Magistrate Judge Robert L. Dubé's Report and Recommendation is ADOPTED. Therefore, it is

ADJUDGED that the motion to dismiss the Amended Complaint is GRANTED with prejudice as the Court agrees that the alleged misstated information was not required to be disclosed under ERISA and is not the type of information that would permit participants to make informed benefit-related

decisions. The alleged misstatements concern how and why the Defendants amended the Plan. Thus, the Defendant could not have been engaged in a fiduciary act of plan administration when they made the statements that would give rise to a claim for breach of fiduciary duty.

Additionally, the Court has noted that the Plaintiffs have failed to allege detrimental reliance or loss causation, which are required elements for a breach of fiduciary duty claim. The Plaintiffs have not alleged a causal link between the claimed breach and any purported losses. The Court agrees that the failure to plead such elements is due to a lack of existing facts rather than lack of clarity in any of the Plaintiffs' responsive pleadings.

This Court also agrees with the Magistrate's determination that the Federal RICO claims fail because proximate causation and reliance have been insufficiently pled. It is also

ADJUDGED that the motion to certify the class is DENIED as MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this *28th* day of February, 2000.

/s/ _____
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

APPENDIX C

[Filed 1/24/00]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-998-CIV-MORENO/DUBÉ

JOAN SWAIN and IAN A. O'CONNOR,
and on behalf of numerous ascertainable individuals,
Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY, *et al.*,
Defendants.

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Defendants' Motion to Dismiss the Amended Complaint (D.E. #127) pursuant to an order of reference entered by the Honorable Federico A. Moreno, United States District Judge. Oral Argument was held on Defendants' Motion to Dismiss on January 14, 2000, and parties were able to file supplemental memoranda by January 18, 2000. This Court has perused the motion and the file in this cause.

I. Discussion

Plaintiffs Swain and O'Connor have filed a third Amended complaint (D.E. #117), alleging that Defendants mailed out a series of letters/notices which misrepresented that amendments to the Allstate Pension Plan ("the Plan") were required by the Tax Reform Act of 1986 ("TRA-86"). Amended Complaint at ¶¶ 24, 25, 33, 34. Plaintiffs allege these letters "deliberately, willfully and falsely represented to the participants that all future amendments to The Plan regarding the way participants' benefits would be calculated were required by TRA-86." *Id.* at ¶¶ 26(B), 27(A), 28(A), 29(A),

30(A)). According to the Amended Complaint, the ERISA §204(h) Notice of December 15, 1994, "deliberately, willfully, and falsely advised The Plan participants that all of the '1990 Amendments' had been adopted and made retroactive to January 1, 1989, solely because the Company had been mandated to do so." *Id.* at ¶ 30(A). Plaintiffs further assert that this notice specifically stated that "the benefit calculation formula would be reduced from 2.5% of the agents compensation to 2% of the agents compensation, and that the Normal Retirement Age would be raised from 63 to 65" and that Defendants represented that both of these changes ('1990 Amendments') were required by TRA-86, even though defendants knew or should have know such representations were false. *Id.*

The case of *Scott v. Administrative Committee of the Allstate Agents Pension Plan*, 113 F.3d 1193 (11th Cir. 1997) is directly instructive in terms of the issues involved in the instant matter. As discussed in *Scott*, the Pension Committee of Allstate's Board of Directors adopted certain amendments to the Allstate Pension Plan in response to TRA '86. *Id.* at 1197. The amendments (i) changed the benefit formula from 2.5% of compensation with a Social Security offset to 2.0% of compensation with no Social Security offset and (ii) changed the normal retirement age under the Plan from 63 to 65. *Id.* The amendments were made retroactive to January 1, 1989, and held lawfully retroactive to January 1, 1989 by the Eleventh Circuit. *Id.* at 1202. The Eleventh Circuit then also held that no ERISA § 204(h) notice, whose purpose is "to give plan participants the opportunity to take advantage of an existing benefit before it is lost," was required. *Id.* at 1202-3.

In light of *Scott*, Judge Moreno, on January 25, 1999, Granted Defendants' Motion for Summary in Part based on *res judicata*. *Swain v. Allstate Ins.*, 1/25/99 Order at 16, 22. In this Order, the Court held that Plaintiffs' misrepresentation claim was not barred since "it appears that the misrepresentation claim may not have ripened until

December 15, 1994 [after the *Scott* complaint was filed] when the Plan participants received the first notice that clearly characterized all three Plan amendments as if required by the TRA 86." *Id.* at 14-15. This Order also specifically held, without deciding or even discussing the merits of the misrepresentation claim, that "Plaintiffs' complaint can go forward inasmuch as each states a claim for misrepresentation. As a matter of law, however, the Court concludes that any claim by the Plaintiffs that certain Plan amendments could not be enacted retroactively is precluded by the Eleventh Circuit's decision in *Scott*," *Id.* at 21-22. Plaintiffs then filed an amended complaint which was stricken because it was not in conformity with the Court's January 25, 1999 Order that "claims challenging the retroactive amendments of the Plan or seeking restoration of pre-amendment benefit levels are precluded by . . . *Scott*." *Swain v. Allstate Ins.*, Orders 4/19/99 and 6/8/99.

On June 22, 1999, Plaintiffs filed a third Amended Complaint asserting counts for Breach of Fiduciary Duty under ERISA (Count I) and Federal RICO, with mail fraud and embezzlement/theft from a pension plan as predicate acts (Count II).[1] In response, Defendants filed this Motion to Dismiss the amended Complaint (D.E. #127) with prejudice, which is presently before the Court. *See* Defendants' Memorandum in Support of Motion to Dismiss at p. 23.

For purposes of a motion to dismiss, the complaint or counterclaim must be construed in a light most favorable to the non-moving party and the court must take the allegations contained in the complaint as true. *See, Harris v. Procter & Gamble Cellulose Co.*, 73 F.3d 321 (11th Cir. 1996).

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[1] Plaintiffs filed an Amended Civil RICO Statement after the Motion to Dismiss was ripe. On December 14, 1999, the parties were directed to file supplemental memoranda, including a response and reply, discussing the impact, if any, of Plaintiffs' Amended Civil RICO Statement on Defendants' Motion to Dismiss.

However, the court is not required to accept as true allegations which state conclusions of law. *Solis-Ramirez v. U.S. Dept. of Justice*, 758 F.2d 1426, 1429 (11th Cir. 1985). A complaint or counterclaim should not be dismissed for failure to state a claim unless it appears beyond doubt that the pleader can prove no set of facts in support of the claim which would entitle him to relief. *See, Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Harris*, 73 F.3d at 324.

A. Count I–Breach of Fiduciary Duties

Count I of Plaintiffs' Amended Complaint seeks recovery for breach of fiduciary duties under ERISA. Concerning this count, Defendants argue that they were not acting in a fiduciary capacity as sending the notices was part of the non-fiduciary act of amending the plan. Defendants further argue that the they were not engaged in a fiduciary act because giving the reasons why the plan was amended, which they were not required to do, is not material in light of ERISA's disclosure provisions. As such, without a fiduciary act, there can not be breach of fiduciary duty.

Defendants raise the legal issue as to their status as an ERISA fiduciary, which is the "keystone of an action under ERISA." *Burns v. Rice*, 39 F.Supp.2d 1350, 1355 (M.D. Fla. 1998)(citing *Lockheed Corp. v. Spink*, 517 U.S. 882, 889 (1996)). Plaintiffs' conclusory allegations in the amended complaint (*see, e.g.*, Amended Complaint at ¶¶ 32, 36) that Defendants were acting as fiduciaries under ERISA are insufficient to preclude examination of this legal issue. *Burns*, 39 F.Supp.2d at 1355 (M.D. Fla. 1998) (citing *Solis-Ramirez*, 758 F.2d at 1429).

Under Section 3(21)(A) of ERISA, one is a fiduciary to the extent that:

> (I) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting

> management or disposition of its assets, (ii) he renders investment advice for a fee or there compensation, direct or indirect, with respect to any moneys or other property of such plan, or has authority or responsibility to do so, of (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C.A. § 1002 (21(A)(1999). This definition does not make a person, who is a fiduciary for one purpose, a fiduciary for every purpose. *Gelles v. Skrotsky*, 983 F.Supp 1398, 1401 (M.D. Fla. 1997), *aff'd*, 189 F.3d 484 (11th Cir. 1999). Rather, "a person is a fiduciary to the extent that he performs one of the described duties." *Id.* (citing *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 93-99 (1993)).

Discretionary acts of plan administration do fall within the statutory definition of fiduciary acts. ERISA § 3(21)(A). An employer or plan sponsor, however, does not act as an ERISA fiduciary in amending pension or welfare plans. *Lockheed*, 517 U.S. at 889; *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). "[A]n employer's decisions regarding whether, how much, and to whom to provide benefits, generally known as 'plan design' decisions, do not fall within the scope of the defined functions of an ERISA fiduciary, and thus [] an employer can make such decisions without being subject to liability to breach of fiduciary duty under ERISA." *Burns*, 39 F.Supp.2d at 1356 (citing *Lockheed*, 517 U.S. at 889) (citations omitted). In other words, employers or other plan sponsors are free to amend a pension plan at any time for any reason without being subject to fiduciary review. *Lockheed* 517 U.S. at 889 ; *Ravenscraft v. Hy-Vee Employee Benefit Plan and Trust*, 85 F.3d 398, 400-401 (8th Cir. 1996).

Plaintiffs claim that Defendants breached their fiduciary duties by misrepresenting information. Amended Complaint at ¶ 40. The alleged misrepresented information involves the

reasons why the changes to the Plan were adopted; thus not triggering ERISA's fiduciary provision. As previously discussed, amending the plan, for any reason, is not subject to fiduciary review. *Lockheed*, 517 U.S. at 889. Such reasons include improper motivations as it has been determined that even if an "amendment was enacted in bad faith in an attempt to harm [Plaintiff], a fiduciary breach under ERISA would still not exist." *Gelles*, 983 F.Supp. at 1403 (holding that Defendants could not be liable for breaching their fiduciary duties under ERISA for any roles they may have played in amending the Plans).

Plaintiffs do not allege that Defendants made misleading communications about the terms of the amendments or misrepresented the future of plan benefits in an effort to compel decisions by plan participants, as in *Varity Corp. v. Howe*, 516 U.S. 489 (1996) and *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988) on which Plaintiffs rely. In *Varity*, the Supreme Court analyzed whether the defendants were acting in a fiduciary capacity, and in deciding that communicating the future of plan benefits was an action of administration, recognized that "ERISA itself specifically requires administrators to give beneficiaries certain information about the plan." 516 U.S. at 502, 505. Particularly, the Court stated that "conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of power 'appropriate' to carry out an important plan purpose." *Id.* at 502. In the instant matter, the alleged misstated information was not required to be disclosed and is not of the type that would permit plan participants to make informed benefit-related decisions. As such, the Court agrees with Defendants that they could not have been engaged in a fiduciary act of plan administration when they made the challenged statements. The alleged misstatements concern how and why the Defendants amended the Plan, which

clearly do not support a breach of fiduciary duty claim. Based on the applicable law, relief on this basis is warranted.

Defendants also argue that Plaintiffs' claim for breach of fiduciary duty must be dismissed for failure to allege reliance or loss causation. As noted by the Defendants, Count 1 fails to include allegations of actual detrimental reliance as is required by the applicable law. *Barnes v. Lacy*, 927 F.2d 539, 542 (11th Cir 1991) (affirming grant of summary judgment against eight of nine plaintiffs based on their failure to show detrimental reliance on defendant's, who was held to the standard of a fiduciary under ERISA, alleged misrepresentation); *see also DeWitt v. Penn-Del Directory Corp.*, 912 F.Supp. 707, 715-716 (D. Del. 1996) ("To state claim for breach of fiduciary duty, plaintiff must prove that a material misrepresentation was made, upon which plaintiff detrimentally and reasonably relied"), *rev'd in part on other grounds*, 106 F.3d 514, 519 & n.3 (3rd Cir. 1997). In response, Plaintiffs unsuccessfully argue that reliance is not an element of their claim, essentially relying on *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993) and *Bunnion v. Consolidated Rail Corp.*, 1998 WL 372644, *6-8 (E.D.Pa. May 14, 1998), which discuss materiality.

Moreover, Plaintiffs acknowledge that the element of reliance is indeed missing and is an omission by necessity. On page 9 of Plaintiffs' Response to Defendants' Memoranda Discussing the Effect and Impact, if any, of Plaintiffs' Amended Civil RICO Statement on Defendants' Motion to Dismiss (D.E. #240). Plaintiffs state, "In this case, the Notices to the Plan Participants that the only Plan changes that were being made were the ones that were required by TRA-86 are not the type of fraudulent statements that can induce an act in reliance." Although Plaintiffs are discussing the mail fraud aspect of their RICO claim, Plaintiffs' concession equally applies to their claim under ERISA as the statement describes the alleged misrepresentation. Thus,

Plaintiffs, by their own admission, are incapable of pleadings and proving reliance, which is a required element of their breach of fiduciary duty claim.

Defendants further argue that this count is insufficient since Plaintiffs fail to allege loss causation. *Ironworkers Local No. 272 v. Bowen*, 695 F.2d 531, 536 (11th Cir. 1983) (stating that a fiduciary is not liable under ERISA for losses unless the losses were incurred and caused by the fiduciary's breach of duty). Plaintiffs do not allege a causal link between the claimed breach and any purported losses. Although Plaintiffs state that they will address this argument, Plaintiffs ignore this issue in their response as well as supplemental memorandum. Response at n.5. The Court finds that elements necessary to maintain a claim for breach of fiduciary duty are absent. Moreover, it is a lack of existing facts, rather than the language selected or lack of clarity, that results in this insufficiency. This Court is aware that a plaintiff should be given "an opportunity to amend his complaint rather than dismiss it when it appears that a more carefully drafted complaint might state a claim for which relief could be granted." *Frielander v. Nims*, 755 F.2d 810, 813 (11th Cir. 1985). However, as evident from the foregoing, the present matter is not such an instance. Accordingly, Defendants' Motion to Dismiss as to Count I should be granted.

B. Count II- Federal RICO

Although Plaintiffs do not plead a specific subsection of Federal RICO in their Amended Complaint, Plaintiffs, via their RICO Case Statements, have alleged violations of 18 U.S.C. § 1962(a), (c), and (d).[2] Defendants argue that Count

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[2] 18 U.S.C.A. § 1962 (1984 & West 1999) states, in pertinent part:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18,

II should be dismissed because Plaintiffs have failed to demonstrate standing under RICO by failing to plead proximate causation and reliance.

A RICO plaintiff must establish that he has standing to sue under RICO. *Kingston Square Tenants Ass'n v. Tuskegee Gardens Ltd.*, 792 F.Supp. 1566, 1577 (S.D. Fla. 1922). To address this argument, the Court must look at the civil remedies provided under RICO. The relevant statute, 18 U.S.C.A. § 1964(c)(1999) states in pertinent part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . .

Thus, in order to have standing to sue for damages under RICO, Plaintiffs must show: (1) violation of section 1962; (2) injury to business or property; and (3) that the violation caused the injury. *Kingston*, 792 F.Supp. at 1577. "Based on these criteria, the Eleventh Circuit has taken a restrictive view of [RICO] standing," especially with respect to the causal connection prong. *Id.* at 1577-1578.

United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment of operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Here, a "plaintiff must show [ ] that he was injured by reason of the defendant's acts of deception." *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir. 1991). In discussing the "by reason" requirement, the Supreme Court stated that "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in this business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 496 (1985). Then, the Supreme Court held that plaintiffs' damages must "flow from the commission of the predicate acts." *Id.* at 497. "Section 1964(c), as interpreted by the Supreme Court and lower courts, [ ] imposes a proximate causation requirement: the plaintiff's injury must have been proximately caused by the commission of the predicate acts." *Pelletier*, 921 F.2d at 1499. Moreover, in the Eleventh Circuit, standing only exists if a plaintiff's "injury directly flowed from the commission of the predicate acts." *Pelletier*, 921 F.2d at 1499; *see also O'Malley v. O'Neill*, 887 F.2d 1557, 1561 (11th Cir. 1989) (affirming the district court's dismissal for lack of standing in finding that plaintiffs did not demonstrate in the complaint or RICO case statement that plaintiffs' losing their job was directly caused by defendants' mailing of false reports). To meet the proximate causation requirement when the alleged predicate act is mail or wire fraud, "the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme." *Pelletier*, 921 F.2d at 1499-1500.

In the instant matter, Defendants argue that Plaintiffs lack standing since they have failed (i) to allege that they suffered any harm proximately caused by Defendants' alleged misrepresentation (18 U.S.C. § 1962(c)) or injury proximately caused by the use or investment of racketeering income (18 U.S.C. § 1962(a)) and (ii) to allege that they relied in any way to their detriment on the alleged misrepresentations. The Court agrees.

In order to have standing, Plaintiffs must allege a direct causal nexus between the claimed misrepresentations or use or investment of racketeering income and any economic loses they may have suffered. *O'Malley*, 887 F.2d at 1561; *see also Morast v. Lance*, 631 F.Supp. 474, 481 (N.D. Ga. 1986), *aff'd*, 807 F.2d 926 (11th Cir. 1987) (holding that plaintiff lacked standing because he had not alleged that damages "flow from the commission of the predicate acts"). Plaintiffs have not established that causal nexus. Plaintiffs make the allegation that they were directly damaged "by the loss of contributions to The Plan and by the additional years of service which were required by the amendments to The Plan." *Id.* at ¶ 47. There are no allegations, however, in the Amended Complaint that Plaintiffs were injured by the alleged misrepresentations or by the use or investment of investment of racketeering money.

Moreover, in the RICO Case Statements, when asked to describe how they were "directly injured," Plaintiffs do not connect their purported injuries to the alleged misrepresentations or the use or investment of racketeering money.[3] Plaintiffs allegations suggest that their injury was caused as result of the amendments themselves and that Plaintiffs are attempting to use the RICO statutes as a source of recovery for certain pre-amendment benefit levels. *See Morast*, 807 F.2d at 933 (after affirming that plaintiff's injury, his discharge, did not flow from the predicate acts, the Court noted, in accordance with the District Judge, that plaintiff was not using RICO to stop the alleged illegal practices but rather as a source of recovery for the loss of his job).

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[3] Moreover, Plaintiffs' injuries seem to be of the type "challenging the retroactive amendment of the Plan or seeking restoration of pre-amendment benefit levels, "which are precluded by previous orders of Judge Moreno. *Swain v. Allstate Ins.*, Orders 1/25/99 and 4/19/99; Amended Complaint at ¶ 49(B); RICO Case Statement at p. 32, 34; Amended RICO Case Statement at pp. 22-24.

Additionally, when the predicate act is mail fraud, reliance is required, as part of proximate causation, to confer RICO standing. *Pelletier*, 921 F.2d at 1499-1500. One of Plaintiffs' RICO predicate acts is mail fraud. Plaintiffs, as previously discussed, admit that the notices with the information in question were incapable of inducing an act of reliance. *See* Plaintiffs' Supplement Response (D.E. #240) at p.9. Plaintiffs then "concede that the mail fraud portion of their Amended Complaint must fail" if the Court finds that an act incapable of inducing reliance is not sufficient to support the predicate act of mail fraud. *Id.* Plaintiffs acknowledge a failure to plead and prove reliance as part of their RICO claim and agree to dismissal if the Court finds that reliance is an essential element when mail fraud is a predicate act, which it has. As to Count II, the Court finds that Plaintiffs lack standing to sue under Federal RICO.

Plaintiffs also allege for their RICO claim the predicate act of embezzlement in violation of 18 U.S.C. § 664. Defendants argue that Plaintiffs have failed to meet the pleading requirement for this predicate act. As discussed by the Supreme Court, a RICO plaintiff must establish that the defendant could be convicted for violating the predicate statute. *Sedima*, 473 U.S. at 486-88; *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 948-49 (11th Cir. 1997). In order to survive a motion to dismiss, "a plaintiff must allege facts sufficient to support each of the statutory elements for at least two of the pleaded predicate acts." *Republic*, 119 F.3d at 949.

The gist of a 18 U.S.C. § 664 violation is use of an ERISA plan's assets "in an unauthorized manner to an unauthorized extent." *See e.g., United States v. Andreen*, 628 F.2d 1236, 1241 (9th Cir. 1980). In order to prove that Defendants engaged in a pattern of racketeering activity, it is necessary to demonstrate that the Defendants possessed the fraudulent intent required to prove a violation of 18 U.S.C. § 664.

Baggett v. Woodbury, 1987 WL 383796, *31 (N.D. Fla. January 6, 1987), *aff'd*, 874 F.2d 819 (11th Cir. 1989); *Andreen*, 628 F.2d at 1241-42. This statute requires proof of specific intents/criminal scienter. *Id.* Moreover, such allegations can not be "merely conclusory and unsupported by any factual allegations." *Republic*, 119 F.3d at 949.

Plaintiffs do not allege with specificity that the Defendants had the requisite fraudulent intent, nor can such be inferred. Plaintiffs simply allege that making and mailing the purported misleading statements violated 18 U.S.C. § 664. Amended Complaint at ¶¶ 45, 46, 48. Moreover, on p.23 of Plaintiffs' Civil RICO Case Statement, when instructed to state with particularity the circumstances constituting fraud, Plaintiffs responded "Not applicable." In their Amended RICO Case Statement, Plaintiffs changed their response, but only to conclusory and vague statements. *See* Amended RICO Case Statement at p. 16.

Also, Plaintiffs claim that a violation of §664 occurred "by failing to calculate benefits at a 2.5% rate" and through the reduction and conversion of benefits "pursuant to the 1990 Remedial Amendments allegedly adopted to conform with TRA-86." *See* Plaintiffs' Supplemental Response (D.E. #240) at p. 10; RICO Case Statement at pp.22-23; Amended RICO case Statement at p. 15. Besides concerning injuries precluded by Judge Moreno, according to these allegations, Defendants were administering the Plan in accordance with the amendments held lawful in *Scott*, and thus, do not support a violation of 18 U.S.C. § 664. Plaintiffs have failed to allege facts and elements to sustain the alleged conduct. Further, as to Count II, failure to establish a claim under RICO negates any cause of action under the RICO conspiracy section. *See Bagilo v. Baska*, 940 F.Supp. 819, 836 (W.D. PA. 1996), *aff'd*, 116 F.3d 467 (3rd Cir. 1997). In all, the Court finds that the allegations in Count II are insufficient to withstand a Motion to Dismiss. The deficiencies found in Count II also

appear unable to be cured through "a more carefully drafted complaint." *Frielander*, 755 F.2d at 813. Accordingly, Defendants' Motion to Dismiss Count II of the Amended Complaint should be granted. As a result of the determinations as to Count I and Count II, the Court will not address the other presented arguments.

II. Conclusion and Recommendation

Based on the foregoing, it is hereby recommended that Defendants' Motion to Dismiss the Amended Complaint (D.E. #127) be GRANTED. In light of this Report and Recommendation, it is further recommended that Plaintiffs' Motion for Class Certification (D.E. #162) and Plaintiffs' Motion for Summary Judgment (D.E. #123) both be DENIED AS MOOT.

Pursuant to Local Magistrate Rule 4(b), the parties have ten (10) days from service of this Report and Recommendation to serve and file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. Failure to timely file objections shall bar the parties from attacking on appeal the factual findings contained herein. *Loconte v. Dugger*, 847 F.2d 745 (11th Cir. 1988), *cert denied*, 488 U.S. 958 (1988); *R.T.C. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

DONE AND ORDERED this 24th day of January, 2000.

/s/ _____
ROBERT L. DUBÉ
UNITED STATES MAGISTRATE JUDGE

cc: Honorable Federico A. Moreno

APPENDIX D

[Filed 2/29/00]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 96-0998-CIV-MORENO

JOAN SWAIN and IAN A. O'CONNOR, and
on behalf of numerous ascertainable individuals,
Plaintiffs,

vs.

ALLSTATE INSURANCE COMPANY, *et al.*,
Defendants.

FINAL JUDGMENT

Pursuant to Fed. R. Civ. P. 58 and the Court's Order Adopting the Magistrate's Report and Recommendation and Order Granting Defendants' Motion to Dismiss with Prejudice, it is

ADJUDGED that judgment is entered in favor of Defendants, ALLSTATE INSURANCE COMPANY, *et al.* and against Plaintiffs, JOAN SWAIN and IAN A. O'CONNOR, and on behalf of numerous ascertainable individuals. The case, namely the entire complaint, is dismissed with prejudice. Further, it is

ADJUDGED that any pending motions are DENIED as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 28th day of February, 2000.

/s/ _____
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

APPENDIX E

[Filed 1/25/99]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 96-0998-CIV-MORENO

JOAN SWAIN and IAN A. O'CONNOR, and
on behalf of numerous ascertainable individuals,
Plaintiffs,

vs.

ALLSTATE INSURANCE COMPANY, *et al.*,
Defendants.

ORDER GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS CAUSE arises from the Defendants' amendment of the Allstate Pension Plan following Congress' passage of the Tax Reform Act of 1986. The Plaintiffs are employee-plan participants; the Defendants the employer-plan sponsor ("Allstate"). Allstate argues that the Plaintiffs' claims are barred because of prior litigation in *Scott v. Administrative Comm. of the Allstate Agents Pension Plan*, 113 F.3d 1193 (11th Cir. 1997). The Court finds that the Eleventh Circuit's decision in *Scott* precludes the Plaintiffs' claim that certain Plan amendments could not be enacted retroactively. However, the Court finds that the Plaintiffs' misrepresentation claim is not precluded.

PROCEDURAL POSTURE

The Plaintiffs filed their complaint here after an unsuccessful attempt to intervene in a case before Judge Wm. Terrell Hodges in the Middle District, *Scott v. Administrative Comm. of the Allstate Agents' Pension Plan*. No. 93-1419, 1995 U.S. Dist. LEXIS 20564 (M.D. Fla. Sept. 15, 1995).

The Plaintiffs' complaint alleges that Allstate misrepresented that certain retroactive Plan amendments were required by the Tax Reform Act of1986. The Plaintiffs argue, moreover, that the challenged amendments could not be implemented retroactively.

On August 20, 1996, this Court granted the Defendants' Motion to Stay the case pending the Eleventh Circuit's resolution of the appeal from Judge Hodges' decision.

After the Eleventh Circuit ruled in *Scott v. Administrative Comm. of the Allstate Agents Pension Plan*, 113 F.3d 1193 (11th Cir. 1997), the case was reopened. The Defendants filed this Motion to Dismiss or, in the Alternative, for Summary Judgment, arguing that the Plaintiffs' claims were barred under *res judicata*, collateral estoppel, or *stare decisis* as a result of the Eleventh Circuit's decision in *Scott*.[1]

BACKGROUND

The Tax Reform act of 1986 required pension plan sponsors to either eliminate pension features that discriminated in favor of highly paid employees, or forfeit the tax advantages of being a qualified pension plan. The Tax Reform Act of 1986 identified the Social Security offset as a discriminatory feature:

> One of the most common instances of the discrimination Congress wanted to eliminate was the Social Security offset. . . . . Benefits are commonly calculated as a percentage of annual salary. The Social Security offset reduced everyone's benefits by the amount of the Social

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[1] Since the Defendants' motion rests on evidence outside the pleadings, it will be treated as a motion for summary judgment. *Concordia v. Bendekovic*, 693 F.2d 1073, 1075 (11th Cir. 1982) (noting that when *res judicata* is raised in a motion to dismiss rather than as an affirmative defense in an answer, the motion should be treated as one for summary judgment since evidence of the precluding decision rests outside the pleadings).

> Security benefit. However, because the amount of salary subject to Social Security was limited to approximately $54,000, the Social Security offset necessarily reduced a higher proportion of the pension benefit for low earning employees as compared to employees earning more than $54,000. For example, for an employee earning $54,000, the Social Security offset operates as to *all* of his or her salary, whereas for an employee earning $108,000, the Social Security offset operates as to only one half.

Scott, 113 F.3d at 1195 & n.4.

The Tax Reform Act of 1986 required that discriminatory features like the Social Security offset be eliminated by January 1, 1989, and directed the Secretary of the Treasury to issue regulations to help sponsors amend their pension plans to comply with the law by that date. Since the Secretary of the Treasury did not issue the regulations on time, the Internal Revenue Service issued Notices indicating that sponsors could suspend calculation of benefits after January 1, 1989 until regulations were issued to instruct sponsors on how to amend their pension plans in compliance with the Tax Reform Act of 1986. Essentially, these interim IRS Notices gave sponsors "a means to change benefit accruals retroactive to January 1, 1989, without violating 26 U.S.C. § 411(d)(6), which provides that a plan amendment may not decrease a participant's accrued benefit." *Scott*, 113 F.3d at 1195.

Ultimately, the Treasury Regulations were issued and Allstate amended the Plan, making the changes retroactive to January 1, 1989. In addition to eliminating the Social Security offset, Allstate decreased the annual pension benefit accrual rate from 2.5% to 2% of salary and increased retirement age from 63 to 65. Afterward, Plan participants brought the Middle District case alleging that since Allstate did not comply with the interim IRS Notices, the Plan amendments were ineffective and could not change benefits

retroactively. After a bench trial, Judge Hodges agreed and the *Scott* defendants appealed. The Eleventh Circuit reversed, holding that the *Scott* defendants complied with the interim Notices and, thus, the retroactive amendment of benefits was valid.

In this motion for summary judgment, the Defendants argue that the Eleventh Circuit's decision in *Scott* is controlling here and that by "*res judicata* (or collateral estoppel)" and *stare decisis* they are entitled to judgment as a matter of law. The Plaintiffs counter that: "The Court's decision in *Scott* did not resolve an important issue presented in this case: Whether the Allstate Defendants falsely represented to Plan participants that *all* Plan amendments were required by law to be retroactive to January 1, 1989."

LEGAL STANDARD

Summary judgment is authorized where there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The party opposing the motion for summary judgment may not simply rest upon mere allegations or denials of the pleadings; the non-moving party must establish the essential elements of its case on which it will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The nonmovant must present more than a scintilla of evidence in support of the nonmovant's position. A jury must be able reasonably to find for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

LEGAL ANALYSIS

The doctrines of *rest judicata* and collateral estoppel serve similar purposes. *Res Judicata*, or claim preclusion, means that a final judgment bars the same parties from relitigating

the claims raised in a prior action. Collateral estoppel, or issue preclusion, precludes relitigation of a decided issue in a later action by any party to the earlier action. Thus, although similar in purpose, the doctrines are applied differently and will be treated separately here.

RES JUDICATA

"*Res judicata*, or claim preclusion, bars a subsequent claim when a court of competent jurisdiction entered a final judgment on the merits of the same cause of action in a prior lawsuit between the same parties." *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1356 (11th Cir. 1998).[2] Since there is no question that the Eleventh Circuit possessed jurisdiction or that its opinion in *Scott* constituted a final judgment on the merits, the elements of claim preclusion at issues are (1) whether the claim here and in *Scott* are the "same cause of action," and (2) whether the suits involve the "same parties."

"SAME CAUSE OF ACTION"

"The determination of whether a litigant has asserted the same cause of action in two proceedings depends upon whether the primary right and duty are the same in both cases." *Pleming*, 142 F.3d at 1356 (citing *Manning v. City of Auburn*, 953 F.2d 1355, 1356 (11th Cir. 1992)). Accordingly,

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[2] The Eleventh Circuit recently noted that its own precedents appear to lead in two different directions over whether federal courts apply federal or state principles of *res judicata*. *Pleming*, 142 F.3d at 1356 n.1 (comparing *Precision Air Parts, Inc. v. Avco Corp*, 736 F.2d 1499, 1503 (11th Cir. 1984) (a federal court reviewing the preclusive effect of a prior federal judgment applies federal common law) with *NAACP v. Hunt*, 891 F.2d 1555, 1560 (11th Cir. 1990) ("Federal courts apply the law of the state in which they sit with respect to the doctrine of *res judicata*."). In this case, the Court is determining the preclusive effect of a federal court decision on a claim brought under this Court's federal question jurisdiction. The Court will apply the federal law of *res judicata*.

the Court begins with the decision the Defendants claim precludes this action.

From the outset, the Eleventh Circuit in *Scott* framed the plaintiffs' suit as one alleging insufficient notice: "In this case, we must look at whether the four notices sent by defendants informed the average Plan participant that their benefit accruals were temporarily suspended pending adoption of the new formula. . . . [W]e conclude that the notice requirement was satisfied."

> Under the law of ERISA, § 204(h) notice is required in order for a plan sponsor to amend a pension plan like the instant one to reduce the rate of future benefit accruals for plan participants. Section 204(h) of ERISA, 29 U.S.C. § 1054(h), in pertinent part states the following: A plan . . . may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides written notice, setting forth the plan amendment and its effective date.

Scott, 113 F.3d at 1199 (quoting 29 U.S.C. § 1054(h)) (alteration in original).

The Eleventh Circuit held, however, that § 204(h) notice was not possible in *Scott* given the retroactive amendments authorized by the interim IRS Notices:

> It is clear that compliance with § 204(h) is imply an impossibility. Section 204(h) requires notice "*after* adoption of the plan amendment and *not less than 15 days before the effective date of the plan amendment.*" In the context of an amendment which is properly to be applied retroactively, it is obviously impossible to give notice thereof both after the adoption of the amendment and before the effective date thereof.

Scott, 113 F.3d at 1202 (quoting 29 U.S.C. § 1054(h)).

In this case, however, the Plaintiffs' claims are not based on allegations of insufficient notice. When the Defendants amended the Allstate pension Plan retroactively to comply with the Tax Reform act of 1986, they made three principal amendments: (1) they eliminated the Social Security offset; (2) they decreased the annual pension accrual rate from 2.5% to 2% of salary; and (3) they increased retirement age from 63 to 65. The Plaintiffs' case is based on essentially two arguments against the second and third amendments.

First, they allege that the notices the defendants sent to Plan participants misrepresented that all three of these changes were required by the Tax Reform Act of 1986, when, in fact, only the Social Security offset had to be eliminated as a discriminatory feature.

Second, they argue that of the three changes, the new law only "required" the elimination of the Social Security offset and, therefore, that is the only amendment that could validly be made retroactive to January 1, 1989.

In response, the Defendants concede that decreasing the benefit rate from 2.5% to 2% of salary and increasing the retirement age from 63 to 65 were not changes required by the Tax Reform Act of 1986, but dispute the significance of this point. Rather, the Defendants contend, the proper inquiry is whether the Tax Reform Act of 1986 permitted, not required, the changes adopted by Allstate and, more precisely, permitted those changes to be made retroactive to January 1, 1989. The Defendants take this argument a step further, positing that the Tax Reform Act of 1986 and the IRS pronouncements "clearly contemplated the possibility of wholesale plan redesign."

Thus, the Defendants' counter-argument attempts to deflect the Plaintiffs' misrepresentation argument by focusing on whether the Defendants were authorized to make all three changes retroactively, rather than on how the Defendants represented the changes to the plan participants. Nonetheless,

there are two distinct questions here: (1) did the Defendants misrepresent to Plan participants that all three of the Plan amendments were required by the Tax Reform Act of 1986?; and (2) were the two Plan changes that were not strictly "required" by the Act valid retroactive amendments? The inquiry here goes not to the merits of these claims, but merely to whether either is the "same cause of action" as in *Scott*.

MISREPRESENTATION

"From February 1989 to September 1990, defendants distributed a total of four letters to Plan participants informing them of the impact of [the Tax Reform Act of 1986] on the Plan." *Scott*, 113 F.3d at 1196.

First, the February 1989 Notice stated: "The 1986 Tax law . . . *requires* plans that contain a Social Security offset to modify the way benefits are earned," *Scott*, 113 F.3d at 1197 (emphasis added).

The second and third notices sent to Plan participants in December 1989 and April 1990 also mentioned that the Social Security offset would be eliminated. *Scott*, 113 F.3d at 1197.

Finally, the September 1990 Notice "informed participants (1) that proposed [Tax Reform act of 1986] regulations had been issued, (2) *that defendants had made [P]lan changes to comply with these regulations and ha[d] made additional [P]lan changes to support the direction the company is taking*,' and (3) that meetings would be held during the period of October 22, 1990, through November 1990 to discuss the Plan changes." *Scott*, 113 F.3d at 1197 (emphasis added).

From the first notice, then, the Social Security offset was identified as a Plan feature that had to be eliminated after the Tax Reform Act of 1986. By the fourth notice, however, the Plan sponsors do not specify which Plan changes were required for compliance with the Tax Reform Act of 1986

and which were being implemented "*to support the direction the company is taking.*"

This ambiguity worsens in later notices. On October 26, 1990 the Allstate Pension Committee passed a resolution "'to modify the benefit formula for service after 1989 to 2% times eligible annual compensation for each year of credited service; to raise the normal retirement age to 65, *to comply with the applicable requirements of the Tax Reform Act of 1986 and Internal Revenue Service rulings and regulations*, and to effect such additional changes in the Plan . . . as they deem necessary or desirable as a result of the provisions of said Act, rulings and regulations[.] . . ."

Finally, on December 15, 1994, the Defendants sent the following to all Plan participants:

> Pursuant to the requirements of the Internal Revenue Code, the Agents Pension Plan (the "Agents Plan") must be amended no later than December 31, 1994 to reflect all of the requirements of the Tax Reform Act of 1986 and other subsequent legislation (the "Tax Reform Requirements"). *As you have been previously informed, the Agents Plan was amended during 1990 (the "1990 Amendment") to bring the Agents Plan into conformity with the Tax Reform Requirements.* The 1990 Amendment included a change in the benefit formula from a 2.5% of pay with a Social Security offset formula to a 2% of pay with a Social Security offset formula to a 2% of pay formula with no Social Security offset. The 1990 Amendment also included a change in the normal retirement age from 63 to 65 . . . as well as certain other technical changes. *It is the Company's belief that the 1990 Amendment effectively amended the Agents Plan for the Tax Reform Requirements.*

(Emphasis added).

In this last notice, it is clear that all three amendments are described as if required by law. Accordingly, there appear to be triable issues of fact as to the understanding of the average Plan participant and whether the Defendants misrepresented the Plan amendments.

The inquiry here, however, is not to determine the merits of the Plaintiffs' misrepresentation argument, but merely to ascertain whether it presents the "same cause of action" as in *Scott*. The "right and duty" involved in *Scott* was whether the defendants complied with ERISA's notice requirements as modified by the interim IRS Notices. To be sure, the Eleventh Circuit made clear in the summation of its holding that the only issue before the court was ERISA notice: "Because we conclude that the defendants gave satisfactory notice in compliance with the manner in which Rev. Proc. 89-65 incorporates the § 204(h) notice, and because we conclude that a second § 204(h) notice was not required for the November 15, 1991, amendments, we hold that the Plan amendments in this case are retroactive to January 1, 1989." *Scott*, 113 F.3d at 1203.

In contrast, the "right and duty" put in question by the Plaintiffs' misrepresentation claim is whether the Defendants breached their ERISA-imposed fiduciary duty to Plan participants by representing all three Plan amendments as mandatory under the Tax Reform Act of 1986, which is a different cause of action. But *res judicata*, of course, precludes not only those claims actually raised in a prior case, but also those that "could have been brought." *Pleming*, 142 F.3d at 1357. The question, then, becomes whether the misrepresentation claim could have been brought in *Scott*.

The *Scott* plaintiffs filed suit in 1993. From the notices above, however, it appears that the misrepresentation claim may not have ripened until December 15, 1994 when the Plan participants received the first notice that clearly characterized all three Plan amendments as if required by the Tax Reform

Act of 1986. Since this last notice was sent after the *Scott* complaint was filed, the misrepresentation claim does not fall into the "could have been brought" category for *res judicata* purposes:

> the doctrine of res judicata does not punish a plaintiff for exercising the option not to supplement the pleadings with an after-acquired claim. . . . We do not believe that the res judicata preclusion of claims that "could have been brought" in earlier litigation includes claims which arise after the original pleading is filed in the earlier litigation.

Pleming, 142 F.3d at 1357.

Thus, the Plaintiffs' misrepresentation claim does not present the "same cause of action" as in *Scott* or even on that "could have been brought." Accordingly, since each element of *res judicata* must be met for a claim to be precluded, the Plaintiffs' misrepresentation argument is not barred by this doctrine. *I.A. Durbin, Inc., v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1549 n.9 (11th Cir. 1986).

VALIDITY OF THE RETROACTIVE AMENDMENTS NOT "REQUIRED BY THE TAX REFORM ACT OF 1986

The Plaintiffs' second argument is that only those changes absolutely necessary for compliance with the Tax Reform Act of 1986 could be made retroactively. That is, Allstate retroactively amended the Plaintiffs' pension Plan by eliminating the Social Security offset, reducing the benefit accrual rate, and raising the normal retirement age, but only elimination of the Social Security offset was mandated by the Tax Reform Act of 1986. Thus, the Plaintiffs argue, the reduction in benefit rate and increase in retirement age could not be enacted retroactively. In contrast, the Defendants argue that Plan sponsors were empowered to amend plans retroactively in any manner they saw fit to comply with the Tax Reform Act of 1986.

The inquiry here, again, is not to weigh the merits of the Plaintiffs' claim, but merely to determine whether it is precluded by the Eleventh Circuit's *Scott* decision. Employing the "right and duty" test, it is clear that the Plaintiffs' claim here is not the "same cause of action" as in *Scott*. While the "right and duty" involved in *Scott* was whether the defendants complied with ERISA's notice requirements as modified by the interim IRS Notices, the question here is whether Allstate's retroactive reduction of the benefit accrual rate and increase of the retirement age were *ultra vires* acts. That is, were these two changes beyond the scope of amendments that the Tax Reform Act of 1986 empowered plan sponsors to implement retroactively.

Next, since *res judicata* bars not only claims made, but also those that"could have been brought," the question becomes whether the Plaintiffs' claim here could have been raised in *Scott*. Allstate contends that not only could the Plaintiffs have raised their *ultra vires* argument in *Scott*, but that, indeed, the argument was made. For this proposition, Allstate points to the *Scott* plaintiffs' first amended complaint which alleged that neither the reduction in benefit rate nor the increase in retirement age were "required" by the Tax Reform Act of 1986. Although this "general allegation" did not specifically form the basis of any count in the *Scott* plaintiffs' first amended complaint, and neither Judge Hodges nor the Eleventh Circuit considered the issue, the allegations nonetheless demonstrates that the *Scott* plaintiffs could have raised the *ultra vires* argument. Accordingly, the "same cause of action" element of *res judicata* is met.

Thus, the claim preclusive effect of the Eleventh Circuit's *Scott* decision on the Plaintiffs' *ultra vires* argument turns on the only other element of *res judicata* in dispute: whether the litigants in *Scott* and here are the "same parties."[3]

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[3] This inquiry only pertains to the Plaintiffs' *ultra vires* argument because the Court has already determined that *res judicata* cannot bar the

"SAME PARTIES"

The Plaintiffs in this case were not parties in *Scott*. Nonetheless, "[u]nder the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975). To determine whether a non-party was "virtually represented," "[s]everal factors are relevant, including '[1] participation in the litigation, [2] apparent consent to be bound, [3] apparent tactical maneuvering, [and] [4] close relationships between the parties and nonparties.'" *Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th Cir. 1988) (alteration in original) (citing 18 Wright & Miller, *Federal Practice and Procedure* § 4457, at 494-99 (1981 & Supp. 1987)).

First, although the Plaintiffs here were not parties in *Scott*, they filed a motion to intervene in the case. Intervention was denied because the *Scott* court found that their interests were already adequately represented. Notably, the Plaintiffs here complained in their motion to intervene that the *Scott* plaintiffs did not share discovery: evidence of the Plaintiffs' attempt to participate as non-parties in the *Scott* litigation.

Second, the motion to intervene indicates that the Plaintiffs here were willing to forgo an independent claim and, instead, be bound by the outcome of *Scott*.

Third, there is evidence of tactical maneuvering. The Plaintiffs' here each had an opportunity to join *Scott* at is inception but did not. Instead, they waited until shortly before trial, nearly seven months after the first amended complaint was filed, to file their motion to intervene. In addition, the *Scott* court noted in its denial of the motion to intervene that the tactics, namely, the *Scott* plaintiffs'

Plaintiffs' misrepresentation claim since it is not the "same cause of action" as in *Scott*.

decision to limit the number of named plaintiffs and not seek class certification. But, as the *Scott* court aptly noted: "'[a] mere difference of opinion concerning the tactics with which litigation should be handled does not make inadequate the representation of those whose interests are identical with that of an existing party. . . .'" Sept. 29, 1994 Order Den. Mot. to Intervene at 5 (quoting 7C Wright & Miller, *Federal Practice & Procedure* § 1909, at 344 (1986)).

Finally, it appears that the Plaintiffs here and in *Scott* had "closely aligned" interests. *Aerojet-General Corp.*, 511 F.2d at 719. All were participants in the Allstate Pension Plan and all had identical incentive to litigate the case.

For all these reasons, then, the Court find that the Plaintiffs here were "virtually represented" in *Scott*, and, accordingly, that the Plaintiffs here and in *Scott* are the "same parties" for *res judicata*" purposes.

The next consideration is whether the Defendants here and in *Scott* are the "same parties." The Plaintiffs here contend that the "same parties" element cannot be met because the Allstate Insurance Company, Inc., a defendant here, was not a party in *Scott*. Here, however, the Court need not employ the "virtual representative" analysis because "same parties" for *res judicata* purposes include those "in privity" with the prior litigants. *I.A. Durbin, Inc., v. Jefferson Nat'l Bank*, 793 F.2d 1541. 1549 (11th Cir. 1986). Certainly, as the employer-plan sponsor, the Allstate Insurance Company, Inc., is in privity with the entities sued in *Scott*: (1) the Administrative Committee of the Allstate Agents Pension Plan; and (2) the Allstate Agents Pension Plan (as nominal Defendant). Moreover, the individuals named in *Scott* were all corporate officers of Allstate.

Thus, the "same parties" element of *res judicata* is met for all parties.[4] Accordingly, the Plaintiffs' *ultra vires* argument

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[4] The only other defendant here not named in *Scott* is John Diserio. He is named here in his capacity as Secretary to the Administrative

is precluded by *Scott* and the Defendants are entitled to summary judgment on this claim.

COLLATERAL ESTOPPEL

"While *res judicata* bars the relitigation of claims, collateral estoppel precludes the relitigation of an issue that has already been litigated and resolved in a prior proceeding. To claim the benefit of collateral estoppel the party relying on the doctrine must show that: (1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue in the prior litigation must have been 'a critical and necessary part' of the judgment in the first action; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding." *Pleming*, 142 F.3d at 1359 (11th Cir. 1998) (quoting *I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986)).

As the *res judicata* analysis makes clear, the issues here are not identical to the notice issue in *Scott*. Accordingly, the Plaintiffs' claims cannot be barred by collateral estoppel.

STARE DECISIS

For reasons evident in the above discussion, the Court finds that the issues presented here were not decided by the Eleventh Circuit in *Scott* and, accordingly, the outcome of this case is not controlled by that decision.

CONCLUSION

For the above reasons, the Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment (d.e. #61) is

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Committee of the Allstate Pension Plan. Since he is merely the successor to Donald Viken, a *Scott* defendant also sued in his capacity as Secretary to the Administrative Committee, Mr. Diserio's presence in this suit does not disturb the Court's "same parties" finding.

GRANTED in part. The Defendants are entitled to summary judgment on the *ultra vires* claim, bu the misrepresentation claim presents triable issues of fact that are not precluded by the Eleventh Circuit's decision in *Scott*. Accordingly, it is

ADJUDGED that both counts of the Plaintiffs' complaint can go forward inasmuch as each states a claim for misrepresentation. As a matter of law, however, the Court concludes that any claim by the Plaintiffs that certain Plan amendments could not be enacted retroactively is precluded by the Eleventh Circuit's decision in *Scott*.

DONE AND ORDERED in Chambers at Miami, Florida, this 22nd day of January, 1999.

/s/ _____
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE